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No. 348

In the Supreme Court of the United States

OCTOBER TERM, 1950

ANDREW JORDAN, DISTRICT DIRECTOR OF IMMIGRA-
TION AND NATURALIZATION, PETITIONER

v.

SAM DE GEORGE

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

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The Solicitor General, on behalf of petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit (R. 55) which reversed an order of the United States District Court for the Northern District of Illinois dismissing respondent's petition for a writ of habeas corpus and remanded the cause with directions to enter an order discharging him from custody.

OPINION BELOW

The opinion of the Court of Appeals (R. 48-55) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 10, 1950 (R. 55). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether conspiracy to violate the internal revenue laws of the United States with intent to defraud the United States of taxes on distilled spirits is a crime involving moral turpitude within the meaning of Section 19(a) of the Immigration Act of 1917.

STATUTE INVOLVED

Section 19(a) of the Immigration Act of February 5, 1917, 39 Stat. 889, as amended, 8 U.S.C. 155(a), provides in pertinent part:

* * * except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry * * * shall, upon the warrant of the Attorney General, be taken into custody and deported * * *.

STATEMENT

Respondent, a native and citizen of Italy, was taken into custody in February or March, 1949 (see R. 2, 9), under a deportation warrant issued

on January 11, 1946 (R. 41).¹ The order of deportation recited that he was subject to deportation under the provisions of Section 19(a) of the Immigration Act of 1917, in that, subsequent to May 1, 1917, he had been sentenced to imprisonment more than once for a term of one year or more for the commission, subsequent to entry, of crimes involving moral turpitude, to wit, conspiracy to violate the internal revenue laws. The deportation order was based on two convictions. In May 1938, respondent was convicted in the United States District Court for the Southern District of Ohio on his plea of guilty and sentenced to imprisonment for one year and a day (R. 26-27) under an indictment charging him and others with conspiracy to violate 12 sections of the internal revenue laws (R. 27-31). Three of the objective offenses charged in the indictment involved the element of fraud on the United States, as follows (R. 28-29):

to carry on the business of distillers and to defraud the United States of the tax on the liquors distilled by them [R.S. 3257];

* * * * *

to possess spirituous liquors, to wit, whiskey and alcohol, with intent to sell it in fraud of law and evade the tax thereon [R.S. 3452];
to remove and conceal distilled spirits, to wit, whiskey and alcohol, with intent to defraud the United States of the tax thereon [R.S. 3450].

¹ His deportation had meanwhile been stayed at his request (R. 8-9).

In June 1941 respondent was convicted in the United States District Court for the Northern District of Indiana and sentenced to two years' imprisonment (R. 38) under an indictment for conspiracy to commit various offenses against the internal revenue laws (R. 32-37), including defrauding the United States of taxes on distilled spirits² (R. 33).

On March 8, 1949, respondent filed a petition for a writ of habeas corpus in the District Court for the Northern District of Illinois challenging the validity of the deportation order on the ground that the crimes of which he had been convicted "did not involve moral turpitude" and were therefore "insufficient in law and in fact to justify" his deportation (R. 2-3). Petitioner filed a return (R. 5-9) to which he attached the record of the hearing accorded respondent in the deportation proceeding (R. 11-23) and copies of the indictments and convictions referred to above (R. 26-38), which respondent had identified at the administrative hearing as relating to him (R. 6-7, 18-20). After a hearing, the District Court dismissed the petition and remanded respondent to petitioner's custody (R. 42).

² 26 U.S.C. 2806(f): "Whenever any person engaged in carrying on the business of a distiller defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, or any part thereof, he— * * * (2) Shall be fined not less than \$500 nor more than \$5,000, and be imprisoned not less than six months nor more than three years."

The Court of Appeals reversed the order of the District Court and remanded the cause with directions to enter an order discharging respondent (R. 55). The court below thought that "crimes involving moral turpitude, as those words are used in [§ 19(a) of the Immigration Act of 1917]; were intended to include only crimes of violence, or crimes which are commonly thought of as involving baseness, vileness or depravity. Such a classification does not include the crime of evading the payment of tax on liquor, nor of conspiring to evade that tax" (R. 54).

REASONS FOR GRANTING THE WRIT

The decision below is erroneous and is, as the court frankly acknowledged (R. 51-52), in direct conflict with the decisions of the Second and Ninth Circuits in *United States ex rel. Berlandi v. Reimer*, 113 F. 2d 429, and *Maita v. Haff*, 116 F. 2d 337, holding that offenses against the internal revenue liquor laws involving intent to defraud the United States of taxes are crimes involving moral turpitude within the meaning of Section 19(a) of the Immigration Act of 1917. Nor can the decision here be reconciled with the Fifth Circuit's holding in *Guarneri v. Kessler*, 98 F. 2d 580, certiorari denied, 305 U. S. 648, that smuggling with intent to defraud the revenue, in violation of the tariff laws (19 U.S.C. 1593), "is dishonest and fraudulent and involves moral turpitude" (p. 581) and therefore subjects the alien offender to deportation.

The *Berlandi* and *Guarneri* decisions point up what we think is the error in the decision below.³ In its opinion the court below repeatedly referred to respondent's crimes as involving merely evasion of taxes (R. 53, 54), and it thought that Congress did not intend to include such offenses within the classification of crimes involving moral turpitude. The court failed to accord to the element of fraud its proper significance in determining the character of the crimes.⁴ But as the Fifth Circuit said in the similar *Guarneri* case, "Fraud is an ingredient of the offense" (98 F. 2d at 581). And we think it is undeniably true, as the Second Circuit said in the *Berlandi* case, that "Fraud has ordinarily been the test whether crimes not of the gravest character involved moral turpitude in the sense of the statute" (113 F. 2d at 431). Fraud is a badge of moral turpitude. Criminal frauds involving private property have uniformly been held to be crimes involving moral turpitude within the meaning of the immigration laws.⁵ "We think it cannot be said that one who conducts a business [in illicit distilled spirits] with intent to defraud the

³ In the *Maita* case, *supra*, the Ninth Circuit said categorically, without discussion, that "This crime involves moral turpitude."

⁴ The same criticism is applicable to the dissenting opinion of L. Hand, J., in the *Berlandi* case, 113 F. 2d at 431, which the court below cited in support of its decision (R. 53-54).

⁵ *Bermann v. Reimer*, 123 F. 2d 331 (C.A. 2) (obtaining property under false pretenses); *Mercer v. Lence*, 96 F. 2d 122, 124 (C.A. 10) (defrauding by deceit and falsehood); *U. S. ex rel. Robinson v. Day*, 51 F. 2d 1022 (C.A. 2) (forgery); *U. S. ex rel. Medich v. Burmaster*, 24 F. 2d 57, 58 (C.A. 8).

government of taxes and who probably could not conduct it at a profit if he paid the taxes stands in a different position from that of a person who defrauds a private citizen of property." *Berlandi v. Reimer, supra*, at 430-431.

The fact, if it be a fact, that respondent "thought he had been convicted of conspiracy to violate the liquor laws, not the internal revenue laws," and the fact that violations of the Volstead Act during the prohibition era were not regarded as involving moral turpitude, to which the court below adverted (R. 52-53), do not derogate from the reasoned authority of the *Berlandi* and *Guarneri* decisions. For moral turpitude *vel non* attaches to the crime itself as defined by law and particularized in the indictment. The court may not look behind the record of conviction to ascertain whether the alien was blameless or whether the circumstances under which he committed the crime were such as to absolve him of immorality; its function is limited to an examination of the elements of the crime itself to determine whether it is one involving moral turpitude.⁶ And as we have shown, intent to defraud or defrauding the United States, which, we

(withholding and concealing assets in bankruptcy); *U. S. ex rel. Millard v. Tuttle*, 46 F. 2d 342, 345 (E.D. La.) (encumbering mortgaged property with intent to defraud); *Ponzi v. Ward*, 7 F. Supp. 736, 738 (D. Mass.) (using the mails in a scheme to defraud).

⁶ *U. S. ex rel. Zaffarano v. Corsi*, 63 F. 2d 757 (C.A. 2); *U. S. ex rel. Meyer v. Day*, 54 F. 2d 336, 337 (C.A. 2); *U. S. ex rel. Robinson v. Day*, 51 F. 2d 1022 (C.A. 2); *U. S. ex rel. Mylius v. Uhl*, 210 Fed. 860, 863 (C.A. 2).

submit, do manifest moral turpitude, are specific elements of one, at least, of the objective crimes involved in each of the conspiracies of which respondent was convicted.⁷

The case presents an important question in the administration of provisions of our laws governing the deportation and exclusion⁸ of aliens. The conflict created by the decision below as to the proper meaning and application of the phrase "crime involving moral turpitude" can only be resolved by this Court. Cf. *Fong Haw Tan v. Phelan*, 333 U. S. 6, 8.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

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⁷ Neither do the statements from the legislative history cited by the court below (R. 49-50) support its decision. Apart from the fact that such expressions of witnesses at committee hearings are often of dubious value in determining the Congressional purpose (cf. *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 125), the expressions here cited shed little light on the meaning of the words "moral turpitude".

⁸ 8 U.S.C. 136(e) requires the exclusion of "Persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude * * *".